

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of

OSCAR M.G.

Claimant,

v.

EASTERN LOS ANGELES  
REGIONAL CENTER,

Service Agency.

OAH No. L 2006050741

**DECISION**

Daniel Juárez, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on November 16, 2006, in Alhambra, California.

Laura Interiano, a psychologist, represented Oscar M.G. (Claimant).

Felipe Hernandez represented the Eastern Los Angeles Regional Center (Service Agency) as the Executive Director's Fair Hearing Designee.

The parties submitted the matter for decision on November 16, 2006.

**FACTUAL FINDINGS**

1. Claimant, through his parents, requested a due process hearing on or about May 12, 2006. Claimant had applied for Service Agency services, claiming to have a developmental disability, specifically autism. On March 30, 2006, the Service Agency sent Claimant a letter denying him eligibility and concluding Claimant did not have autism or any other developmental disability. Claimant appeals the Service Agency's denial.

2. Claimant contends the Service Agency's March 30, 2006 determination was wrong and he seeks eligibility for Service Agency services as a person with autism. The parties agree the only developmental disability contested in this matter is autism.

3. The Service Agency agrees Claimant has autistic-like characteristics, but it contends Claimant's more appropriate diagnosis is Pervasive Developmental Disorder, Not

Otherwise Specified (PDD-NOS), a condition that is not a developmental disability as defined by state law, and Claimant is therefore not eligible for services.

4. The questions in Claimant's appeal are: 1) Is Claimant a person with autism? 2) If Claimant has autism, does the autism substantially disable him? 3) If Claimant has substantially disabling autism, does he otherwise meet the statutory definition of a developmental disability, and is he thereby entitled to services from the Service Agency?

5. For the reasons set forth below, the Service Agency prevails in this matter and Claimant's appeal is denied.

6. Claimant is a seven-year-old boy who was born in Mexico. While attending a childcare/pre-school in Mexico for an unspecified time, his teachers noted developmental problems, but did not conduct any formal testing. On a date uncertain, Claimant and his family (his father, mother, and a younger sister) moved to the United States, and Claimant began attending school in a kindergarten class. After only four months in kindergarten, however, Claimant and his family moved back to Mexico. In late 2005, Claimant and his family immigrated to the United States with the intention of remaining permanently. Claimant's parents subsequently enrolled him in his local public school within the Los Angeles Unified School District (LAUSD).

7. On or about July 5, 2006, LAUSD diagnosed Claimant with autism. LAUSD also diagnosed Claimant with a speech-language impairment. Claimant currently attends a special day class wherein he receives special education services. A special day class is a highly structured classroom-setting intended for special education students who have disability-related needs that cannot be met in a regular-education classroom.

8. As recent residents of the Los Angeles area, with no extended family nearby, Claimant and his family have kept to themselves. Claimant's mother admits this has led to a somewhat isolated home environment for Claimant. Claimant's parents closely monitor his social environment because Claimant fails to assess physical danger. He will stand precariously at the top of stairwells with his back toward the descent. He does not demonstrate an awareness of traffic danger. In the past, Claimant has followed a stranger wearing clothes of the same color as his father. He will follow a stranger who offers him soda, chips, or other foods he likes. Claimant's parents are understandably concerned with his safety and are extra protective of him in his home environment.

9. Claimant regularly walks on his tiptoes. He needs assistance and supervision to perform most of his personal hygiene tasks. He plays with his sister and imitates her actions. For example, Claimant began toileting by watching his younger sister toilet train and imitating her actions. Claimant first spoke in single words at the age of three. He first spoke in simple sentences at the age of five, and he now can use lengthy sentences in Spanish, at the age of seven. He responds to questions with unrelated comments. He occasionally initiates conversation, but it is rare. He does not use non-verbal communication, like gesturing or body movements. He has made friends with his

classmates; he has six classmates in his special day class. He prefers to interact with adults instead of children. When he interacts with children, he prefers to play with children younger than himself. When Claimant participated in organized team sports (soccer), he was unsuccessful because he would consistently chase the other players on the field, but not the ball. He is affectionate with his family.

10. According to Claimant's special day class teacher, Claimant follows a pre-set path while walking on the school grounds. An LAUSD occupational therapist noted Claimant has a preoccupation with looking closely at objects. Claimant's mother has also observed him staring closely at objects.

11. On November 1, 2005, an LAUSD school psychologist (and Claimant's representative at this hearing) performed a psycho-educational assessment on Claimant and concluded Claimant "presents with many characteristics associated with [a]utism [s]pectrum [d]isorder." (Exhibit I.) She described many of Claimant's mannerisms and behaviors as "autistic-like behaviors." (*Ibid.*) The school psychologist noted Claimant made no eye contact with his schoolteacher (however, she noted Claimant made eye contact with her and that he smiled briefly during the assessment, when praised in his mother's presence; his eye contact was described as inconsistent). The school psychologist further described Claimant as resistant to change, and observed that he interacted minimally with his student peers. She noted Claimant, a Spanish-speaker, showed interest in learning English, and could speak to her in Spanish using lengthy sentences (the school psychologist is a fluent Spanish-speaker). After analyzing the testing she administered, the school psychologist ultimately concluded Claimant "appears to meet eligibility as autistic." (*Ibid.*)

12. As part of her psycho-educational assessment, the school psychologist administered the Gilliam Autism Rating Scale (Gilliam Scale) and the Childhood Autism Rating Scale (CARS). She found Claimant's rating on the Gilliam Scale evidenced a below-average probability for autism, while Claimant's rating on the CARS evidenced mild to moderate autism. The parties agreed that both the Gilliam Scale and the CARS are tools with which to screen for possible autism, but they are not diagnostic tools by themselves, as a diagnosis requires more information from formal, objective testing. The school psychologist also administered the Vineland Adaptive Behavior Scales (Vineland) and concluded Claimant, a six-year-old at the time, scored as follows: in the third percentile for communication (an age equivalency of four years, one month), in the first percentile in daily living skills (an age equivalency of three years, eight months), and in the second percentile in socialization (an age equivalency of three years, four months). Overall, the school psychologist described Claimant's social skills, his adaptive skills (daily living skills), and his academic achievement as below average. However, she cautioned that Claimant's cognitive ability might not have been an accurate representation of his true abilities due to his isolating home environment, his minimal social experiences, and his limited and inconsistent schooling.

13. At hearing, Claimant's representative submitted two pages of Claimant's multi-page June 8, 2006 school individual education plan (IEP), describing Claimant's

social-emotional performance. According to Claimant's representative, that IEP also set out the results of the Autism Diagnostic Observation Schedule (ADOS). According to Claimant's representative, the ADOS is a well-accepted diagnostic tool for diagnosing autism. In handwriting, on one page of the June 2006 IEP, were the alleged results of the ADOS, administered to Claimant on a date uncertain by, among others, the school psychologist. The handwritten notes display number scores and the asserted ADOS cut-off scores for a finding of autism. According to the handwritten notes, Claimant's ADOS scoring confirmed a diagnosis of autism. Claimant did not proffer any narrative to accompany the handwritten results, no information regarding the manner in which the ADOS was administered, and no formal, written evaluation. The information regarding the ADOS was insufficient and incompetent evidence to support a diagnosis of autism. (See, Legal Conclusion 6, *post*.)

14. On December 1, 2005, a licensed clinical psychologist performed a psychological evaluation on Claimant at the Service Agency's request. The clinical psychologist qualified his evaluation as "not a comprehensive psychodiagnostic evaluation of mental or emotional disorders or conditions." (Exhibit 12.) The clinical psychologist administered another Vineland and concluded Claimant scored as follows: 60 in communication (an age equivalency of three years, one month), 59 in daily living skills (an age equivalency of three years, three months), and 69 in socialization (an age equivalency of three years, three months). The clinical psychologist described Claimant's adaptive skills as mildly delayed, and pursuant to intelligence testing, found Claimant to have performed within the low average, to average range of intelligence. He described Claimant as generally distractible and inattentive. The clinical psychologist ultimately concluded Claimant's "qualitative impairment in socialization and communication" is not "significant enough or frequent enough to meet the criteria for the full syndrome of [a]utism." (*Ibid.*) He diagnosed Claimant with PDD-NOS. The clinical psychologist performed no testing specifically meant to diagnose autism, and relied on his clinical observations, some limited interaction with Claimant, his interview of Claimant's mother, and his review of Claimant's file, as provided by the Service Agency. He recommended that Claimant be re-evaluated in 12 to 16 months to "review the validity" of the PDD-NOS diagnosis and "determine the possible presence of the full syndrome of [a]utism." (*Ibid.*) The clinical psychologist who evaluated Claimant did not testify at hearing. Instead, another clinical psychologist, who did not evaluate or interview Claimant, testified for the Service Agency by mostly reading from the December 1, 2005 written evaluation.

15. On July 5, 2006, Kaiser Permanente Hospital's Interdisciplinary Developmental Clinic (Kaiser Clinic) assessed Claimant and diagnosed him with autism. The Kaiser Clinic's evaluation and diagnosis was contained in an unofficial and unsigned transcribed dictation by a Kaiser Clinic pediatrician. According to the Kaiser Clinic, Claimant met 11 criteria for autism, as set out in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). However, the Kaiser Clinic did not show the criteria Claimant met, how Claimant met the criteria, or what specific information the assessors used to conclude an autism diagnosis. The Kaiser Clinic also found Claimant scored within the autistic range on the CARS. The Kaiser Clinic described

Claimant as a client of the “San Gabriel Valley Regional Center” (Exhibit G), though Claimant was never a client of any Regional Center.

16. In a March 2006 unsigned medical report, a Kaiser Clinic neurologist concluded Claimant had autism after the neurologist “[r]eviewed [a] simple criteria checklist for autistic disorder” and found Claimant met the criteria in three unspecified categories. (Exhibit 6.) The neurologist found Claimant “ha[d] 8 out of 12 criteria for autistic disorder and he [met] the criteria for an [sic] autistic disorder.” (*Ibid.*)

17. In June 2006, after performing an occupational therapy evaluation, a Kaiser Clinic occupational therapist and a speech-language pathologist described Claimant as having difficulty communicating, failing to carry conversation, having difficulty making friends, twirling whatever he has in his hand, and twirling his fingers. They further found Claimant played imaginatively (and otherwise appropriately) at home with his sister, and that he attempted brief conversations, though with very little eye contact. In their same report, they also described Claimant’s eye contact as inconsistent. The occupational therapist and speech-language pathologist both described Claimant, overall, as severely delayed in receptive and expressive language skills, having sensory processing deficits, and impaired social and pragmatic skills.

18. The parties agreed each person with autism is unique, and can present with distinct characteristics. The parties agreed there is no “typical” person with autism, when looking at a person’s disability-related characteristics. The parties both relied on the diagnostic criteria set out in the DSM-IV-TR as the standard criteria to diagnose autism.

19. According to the DSM-IV-TR, a person has autism when s/he meets the following:

(A) A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):

(1) qualitative impairment in social interaction, as manifested by at least two of the following:

(a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction

(b) failure to develop peer relationships appropriate to developmental level

(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)

- (d) lack of social or emotional reciprocity
- (2) qualitative impairments in communication as manifested by at least one of the following:
  - (a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)
  - (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
  - (c) stereotyped and repetitive use of language or idiosyncratic language
  - (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level
- (3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
  - (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus
  - (b) apparently inflexible adherence to specific, nonfunctional routines or rituals
  - (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
  - (d) persistent preoccupation with parts of objects
- (B) Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.
- (C) The disturbance is not better accounted for by Rhetts' Disorder or Childhood Disintegrative Disorder.

## **LEGAL CONCLUSIONS**

1. Cause exists to deny Claimant's appeal, as set forth in Factual Findings 1-19, and Legal Conclusions 2-11.

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2. Welfare and Institutions Code section 4512 states:

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

3. California Code of Regulations, title 17, section 54001 states in pertinent part:

(a) “Substantial disability” means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person’s age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parent . . . educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

4. The evidence proved Claimant has a substantially disabling condition, but Claimant did not establish, by a preponderance of the evidence, that he has autism. Claimant relied on evaluations describing his autistic-like behaviors, by evaluators using subjective screening tools, but no evaluator administered formal, objective testing, the type of testing necessary to appropriately diagnose autism, as acknowledged by the parties (see, Factual Finding 12, *ante*). Additionally, the evidence of Claimant's autistic-like behaviors presented an inconsistent picture of his mannerisms and abilities, and a general uncertainty as to his diagnosis. As a result, the evidence was insufficient to establish the diagnosis of autism.

5. According to the November 1, 2005 psycho-educational assessment (Factual Findings 11 & 12), Claimant demonstrated many behaviors contained in the DSM-IV-TR's diagnostic criteria for autism. However, the school psychologist's use of the CARS and Gilliam Scale did not establish a diagnosis of autism, as the Gilliam Scale showed a below-average probability for autism, and both parties agreed the Gilliam Scale and the CARS are best described as screening tools that cannot establish an autism diagnosis alone. While the school psychologist provided the most detailed and thorough description of Claimant, including additional observations of Claimant in his school environment, she used ambiguous and uncertain language in her conclusions. For example, instead of concluding the diagnosis of autism, the school psychologist found "many characteristics associated with [a]utism [s]pectrum [d]isorder," and described Claimant's mannerisms as "autistic-like behaviors." (Factual Finding 11.) In her overall conclusion, the school psychologist is suggestive, at best, stating Claimant "appears to meet eligibility as autistic." (*Ibid.*) Additionally, the school psychologist minimized the significance of Claimant's lack of eye contact by describing instances of eye contact with her, and generally describing his eye contact as inconsistent (as did the Kaiser Clinic). The school psychologist's description of Claimant's delayed language skills was similarly unclear. While there was no dispute that Claimant's initial speech was delayed, the school psychologist observed Claimant using lengthy sentences when speaking in Spanish. She never reconciled that disparity, leaving his current language delay unclear. Moreover, the school psychologist placed an overall uncertainty on all her findings by cautioning the readers about Claimant's cognitive performance, given Claimant's socio-environmental deprivations.

6. While Claimant's representative asserted Claimant's score on the ADOS established an autism diagnosis, the handwriting on Claimant's June 8, 2006 IEP (Factual Finding 13) was insufficient to prove the school psychologist's assertion. Simple handwriting on an IEP cannot adequately substitute for a formal, written evaluation. A formal evaluation would provide necessary information, such as when and how the ADOS was administered, and by whom. A formal, written evaluation would likely describe the testing and certainly discuss Claimant's performance. The two pages of Claimant's June 2006 IEP failed to provide any information with which to assess the reliability and significance of the handwritten scores proffered by Claimant. Claimant's assertion that the ADOS is a well-respected diagnostic tool was also not established by any competent evidence.

7. The Kaiser Clinic documents did not establish Claimant has autism. In the July 5, 2006 document (Factual Finding 15), the dictating pediatrician provided insufficient evidence to demonstrate how she concluded Claimant met the DSM-IV-TR criteria for autism. The pediatrician did not discuss the criteria Claimant met, or what information she gathered to analyze against the diagnostic criteria. The Kaiser Clinic's report was of questionable reliability, as the pediatrician incorrectly described Claimant as a client of the San Gabriel Valley Regional Center (an untrue statement), and was an unofficial and unsigned transcription. It was therefore inadequate to establish a diagnosis of autism. The March 2006 report from the Kaiser Clinic neurologist (Factual Finding 16) similarly failed to establish the diagnosis of autism. The neurologist made mention of a "simple criteria checklist." (*Ibid.*) While the neurologist's discussion of that checklist seemingly correlated to the DSM-IV-TR criteria, he made no mention of what checklist he cited to, and he never cited to the DSM-IV-TR. Moreover, the DSM-IV-TR criteria are more than a simple checklist, and have more categories than those mentioned by the neurologist (see, Factual Finding 19). Therefore, the March 2006 report, an unsigned report, was inadequate to prove Claimant has autism.

8. The December 1, 2005 evaluation proffered by the Service Agency (Factual Finding 14) was also inadequate.<sup>1</sup> The clinical psychologist who evaluated Claimant for the Service Agency diagnosed Claimant with PDD-NOS instead of autism, but did so without explaining why such a diagnosis was more appropriate, and without explaining how Claimant met the diagnostic criteria for PDD-NOS. The evaluation, an assessment that was admittedly not a "comprehensive psychodiagnostic evaluation" (*ibid*), did not establish the diagnosis of PDD-NOS. Moreover, the clinical psychologist's conclusions demonstrated diagnostic uncertainty, as he recommended reevaluating Claimant, in approximately one year, to review the validity of the PDD-NOS diagnosis and to, essentially, reconsider whether Claimant indeed has autism.

9. In addition to the inadequacy of the proffered evaluations, the evidence of Claimant's behaviors described behaviors that could or could not be evidence of autism. Claimant did not prove, by a preponderance of the evidence, that his behaviors were best accounted for by autism. Claimant's representative argued that since autism manifests in distinct ways within each individual (an assertion with which the Service Agency agreed), there is no "typical" autistic behavior. While there may not be "typical" autistic behavior, the parties agreed that Claimant had to meet the DSM-IV-TR criteria to have autism. Claimant exhibited behavioral inconsistencies, inconsistent with the diagnosis of autism, that he did not adequately explain or otherwise reconcile. Where his teacher claimed he followed a pre-set path on school grounds, there was no evidence that he followed the same, or other

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<sup>1</sup> The clinical psychologist who evaluated Claimant did not testify at the hearing. The Service Agency instead relied on another clinical psychologist, who mostly read from the December 2005 evaluation during his testimony. There was no evidence that the Service Agency's witness ever observed or interviewed Claimant. Therefore, the testimony of the Service Agency's witness was given little weight.

ritualized routines in any other settings, or that he did so at school with “inflexible adherence.” (Factual Findings 10 & 19 [DSM-IV-TR criterion (A)(3)(b)].) His lack of eye contact was described sometimes as minimal, but then also described as inconsistent. The school psychologist observed eye contact during her own assessment, and failed to reconcile the significance of that observation. (See, Factual Findings 11 & 19 [DSM-IV-TR criterion (A)(1)(a)].) Claimant never explained why he could play imaginatively with his younger sister, and socially interact with his family and classmates, but not others. (Factual Findings 9 & 19 [DSM-IV-TR criteria (A)(1)(b), (A)(1)(c), (A)(1)(d) & (A)(2)(d)].) Claimant never reconciled his early language delays with his ability to speak in lengthy sentences in Spanish or his ability to initiate brief conversations. (Factual Findings 9, 11, & 19 [DSM-IV-TR criteria (A)(2)(a) & (A)(2)(b)].) Claimant did not explain these inconsistencies, thus the evidence highlighted an unclear picture of Claimant’s behaviors. Claimant did not prove he conclusively met sufficient criteria in the DSM-IV-TR to merit a diagnosis of autism.

10. Though Claimant did not prove he has autism, the evidence did prove his disability is substantially disabling. All the evaluative data consistently described Claimant as a child with substantially impaired social functioning. The evidence showed Claimant has significant limitations in: receptive and expressive language (Factual Findings 9, 11, 17), learning (Factual Finding 7), self-care (Factual Findings 8, 9, 17), and self-direction (Factual Findings 8, 9, 12, 14, 17). The clinical psychologist and the school psychologist both found Claimant had below average adaptive skills. While the clinical psychologist described Claimant’s adaptive skills as mildly delayed, the adaptive skills testing (Vineland) of both the clinical psychologist and school psychologist resulted in similar scores. Claimant’s Vineland percentile scoring and the assessors’ estimated age equivalency (on average, Claimant, a six-year-old at the time of the testing, performed like a three-year-old toddler) demonstrated more than mild delays. Claimant’s adaptive skills are substantially impaired. The assessments elicited a variety of functional limitations, such that Claimant’s social functioning will require interdisciplinary planning and service coordination to assist him in his life. Therefore, Claimant meets the regulatory definition of substantial disability. (Cal. Code Regs., tit. 17, § 54001.) However, since his condition does not meet the statutory or regulatory definition of autism, or any other developmental disability (see, Legal Conclusion 11), he is not eligible for regional center services.

11. Claimant did not present sufficient evidence of eligibility under any other statutory category of developmental disability, including the fifth category of eligibility (disabling conditions closely related to mental retardation or disabling conditions that require treatment similar to that required for individuals with mental retardation (see, Welf. & Inst. Code § 4512, subd. (a))).

12. While Claimant did not prove his case, the clinical psychologist’s recommendation to seek reevaluation in a year’s time (Factual Finding 12), may be useful. The parties can then ascertain or verify Claimant’s diagnosis, by reviewing what may be more complete and definitive data.

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## **ORDER**

Claimant's appeal is denied.

Dated: November 29, 2006

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DANIEL JUAREZ  
Administrative Law Judge  
Office of Administrative Hearings

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.